Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(IM)(NCC)-1474–08 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND ABDUL RAHMAN SEBLI JJCA
15 SEPTEMBER 2015

Civil Procedure — Striking out — Application to strike out action — Whether action time barred — Whether filed outside six year limitation period prescribed by Item 94 of Schedule to Sarawak Limitation Ordinance — Whether respondent's action premised on breach of contract in writing or to enforce payment of money charged upon immovable property under Item 101 of the Ordinance — Whether respondent as chargee taken any action to enforce third party charge to recover outstanding loan amount — Whether claim action in personam or action in rem — Whether trial judge erred in dismissing application to strike out action

Bumiputra-Commerce Bank Bhd, now known as CIMB Bank Bhd ('CIMB'), had granted Merces Builders (S) Sdn Bhd ('the borrower') a RM5m term loan, which was secured by a third party charge over a piece of land situated in the Muara Tebas Land District ('the property'). In addition the term loan was secured by a corporate guarantee from the borrower and a personal guarantee from Sim Kiang Chiok ('the appellant') and two others. The appellant had executed a letter of guarantee and indemnity with CIMB to indemnify the bank, if the borrower failed to fulfill its obligations under the loan agreement. The borrower defaulted on its loan repayments. On 9 June 2007, CIMB issued a letter of demand to the borrower demanding repayment of the outstanding sum of RM7,857,698.30, being the debt inclusive of accrued interest. Subsequently, on 26 February 2014, Southeast Asia Special Asset Management Bhd ('the respondent'), the successor-in-title to CIMB, filed a suit against the appellant. The appellant applied to strike out the respondent's claim under O 18 r 19 and O 92 r 4 of the RHC 1980 on the grounds that that the respondent's action was time barred having been filed outside the six year limitation period prescribed by Item 94 of the Schedule to the Sarawak Limitation Ordinance ('the Ordinance'). The respondent argued that the suit was to enforce payment of money charged upon the land or immovable property ie a claim under Item 101 of the Ordinance. Under Item 101 the suit against the appellant had to be filed within 12 years and therefore the respondent argued that its action was filed within the limitation period, as it had until 9 June 2019 to sue the appellant. The trial judge acceded to the respondent's argument and dismissed the appellant's application. This was the appellant's appeal against that decision. It was the appellant's contention that

the respondent's suit was premised on a breach of a contract in writing, namely the letter of guarantee and indemnity, and that Item 94 would therefore apply. The appellant contended that the last date for the respondent to file its action for breach of the contract fell on 9 June 2013 and that since the respondent had failed to do so the present suit was statute barred.

Held, allowing the appeal with costs:

(1) The respondent's present suit against the appellant was premised on a breach of contract by the borrower for which the appellant was equally and personally liable under the letter of guarantee and indemnity, a contract in writing. Prima facie any action for breach of contract would fall under Item 94 of the Schedule. In the present case, when the respondent issued the letter of demand and instituted the present suit against the appellant, it was clearly an action to enforce the letter of guarantee and indemnity and not an action to enforce the memorandum of charge. In fact, the respondent as chargee had not taken any action to enforce the third party charge to recover the outstanding loan amount. An action to enforce payment of money charged upon immoveable property under Item 101 could only be done by enforcing the charge and not by enforcing the letter of guarantee and indemnity, which was not a charge document (see paras 14–20).

(2) The fact that cl 10 of the letter of guarantee and indemnity expressly provided that the appellant was not only a guarantor but also a principal debtor did not turn the respondent's action into an action to enforce payment of money upon charged property. It remained an action premised on a breach of a contract in writing (see para 21).

(3) In any case, the property was charged to the respondent by the borrower and not by the appellant. Thus, it was inconceivable how in that situation the respondent's action, which was based on the letter of guarantee and indemnity and not on the memorandum of charge, could be described as an action to enforce payment of money charged upon that property. On the facts of the present case, the respondent's claim for the RM7,857,698.30 debt inclusive of accrued interest was an action in personam against the appellant and not an action in rem to enforce payment of money charged upon immoveable property. Such action fell within the confines of Item 94 and not Item 101. The limitation period was therefore six years from the date of demand. The present claim was thus clearly time barred and ought to have been struck out (see paras 22, 33 & 42).

(4) The decision of the court in the *Kong Ming Finance Corporation*'s case, relied upon by the respondent, was distinguishable as the facts were materially at odds with the facts of the present case (see para 41).

[Bahasa Malaysia summary

Bumiputra-Commerce Bank Bhd, kini dikenali sebagai CIMB Bank Bhd ('CIMB'), telah memberikan Merces Builders (S) Sdn Bhd ('peminjam') pinjaman berjangka RM5 juta, yang dijamin oleh gadaian pihak ketiga atas sebidang tanah terletak di Daerah Tanah Muara Tebas ('hartanah'). Selain itu pinjaman berjangka itu dijamin oleh jaminan korporat daripada peminjam dan jaminan peribadi daripada Sim Kiang Chiok ('perayu') dan dua orang lagi. Perayu telah menyempurnakan satu surat jaminan dan indemniti dengan CIMB untuk melindungi bank tersebut, jika peminjam gaagl untuk memenuhi tanggungjawabnya di bawah perjanjian pinjaman itu. Peminjam telah gagal membuat bayaran balik pinjamannya. Pada 9 Jun 2007, CIMB telah mengeluarkan surat tuntutan kepada peminjam menuntut pembayaran balik jumlah tertunggak RM7,857,698.30, iaitu hutang termasuk faedah terakru. Berikutan itu, pada 26 Februari 2014, Southeast Asia Special Asset Management Bhd ('responden'), pengganti dalam hak milik untuk CIMB, memfailkan saman terhadap perayu. Perayu memohon untuk membatalkan tuntutan responden di bawah A 18 k 19 dan A 92 r 4 KMT 1980 atas alasan bahawa tindakan responden telah luput had masa kerana telah difailkan di luar tempoh had masa enam tahun yang ditetapkan oleh Butiran 94, Jadual kepada Ordinan Had Masa Sarawak ('Ordinan'). Responden berhujah bahawa guaman itu telah menguatkuasakan bayaran wang yang dikenakan ke atas tanah itu atau hartanah yang tidak boleh dialih iaitu tuntutan di bawah Butiran 101 Ordinan. Di bawah Butiran 101 guaman terhadap perayu perlu difailkan dalam tempoh 12 bulan dan oleh itu responden berhujah bahawa tindakannya telah difailkan dalam tempoh had masa itu, kerana ia mempunyai sehingga 9 Jun 2019 untuk menyaman perayu. Hakim perbicaraan telah bersetuju dengan hujah responden dan menolak permohonan perayu. Ini adalah rayuan perayu terhadap keputusan tersebut. Ia adalah hujah perayu bahawa guaman responden berasaskan pelanggaran kontrak bertulis, iaitu surat jaminan dan indemniti, dan bahawa Butiran 94 dengan itu adalah terpakai. Perayu berhujah bahawa tarikh akhir untuk responden memfailkan tindakannya untuk pelanggaran kontrak adalah pada 9 Jun 2013 dan oleh kerana responden telah gagal berbuat demikian guaman ini telah luput had masa.

Diputuskan, membenarkan rayuan dengan kos:

(1) Guaman responden ini terhadap perayu berasaskan pelanggaran kontrak oleh peminjam yang mana perayu sama juga bertanggungjawab secara peribadi di bawah surat jaminan dan indemniti, satu kontrak bertulis. Secara prima facie apa-apa tindakan kerana pelanggaran kontrak terjatuh di bawah Butiran 94 kepada Jadual. Dalam kes ini, apabila responden mengeluarkan surat tuntutan dan memulakan guaman ini terhadap perayu, ia jelas satu tindakan untuk menguatkuasakan surat jaminan dan indemniti dan bukan tindakan untuk menguatkuasakan memorandum gadaian. Bahkan, responden sebagai pemegang gadaian tidak mengambil

apa-apa tindakan untuk menguatkuasakan gadaian pihak ketiga bagi mendapatkan semula jumlah pinjaman tertunggak. Satu tindakan untuk menguatkuasakan bayaran wang yang dikenakan ke atas hartanah tak boleh alih di bawah Butiran 101 hanya boleh dilakukan dengan menguatkuasakan gadaian itu dan bukan dengan menguatkuasakan surat jaminan dan indemniti, yang bukan dokumen gadaian (lihat perenggan 14-20).

(2) Fakta bahawa fasal 10 surat jaminan dan indemniti jelas memperuntukkan bahawa perayu bukan sahaja penjamin tetapi juga penghutang utama tidak menjadkan tindakan responden satu tindakan untuk menguatkuasakan bayaran wang ke atas hartanah yang digadaikan itu. Ia kekal satu tindakan berasaskan pelanggaran kontrak bertulis (lihat perenggan 21).

(3) Dalam apa-apa kes, hartanah telah dicagarkan kepada responden oleh peminjam dan bukan oleh perayu. Oleh itu, ia adalah dibayangkan bagaimana dalam keadaan itu tindakan responden, yang berdasarkan surat jaminan dan indemniti dan bukan berdasarkan memorandum gadaian, boleh digambarkan sebagai tindakan untuk menguatkuasakan pembayaran wang dikenakan ke atas hartanah itu. Berdasarkan kepada fakta kes ini, tuntutan responden untuk hutang RM7,857,698.30 termasuk faedah terakru adalah satu tindakan *in personam* terhadap perayu dan bukan tindakan *in rem* untuk menguatkuasakan pembayaran wang dikenakan ke atas hartanah tak alih. Tindakan sebegitu terangkum dalam batasan Butiran 94 bukan Butiran 101. Tempoh had masa oleh itu adalah enam tahun dari tarikh tuntutan. Dengan itu, tuntutan ini jelas luput had masa dan sepatutnya telah dibatalkan (lihat perenggan 22, 33, 42).

(4) Keputusan mahkamah dalam kes *Kong Ming Finance Corporation*, yang digunakan oleh responden, boleh dibezakan kerana fakta itu secara material bertentangan dengan fakta kes ini (lihat perenggan 41).]

Notes

For cases on application to strike out action, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8809–8847.

Cases referred to

American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd [1973] 1 MLJ 95, FC (refd)

Borneo Housing Mortgage Finance Bhd v Mygal bin Gibie & Anor [2004] 4 MLJ 12, HC (refd)

Datuk Bandar Kuching Utara v Kuching Plaza Sdn Bhd & Ors [2007] 3 MLJ 346, HC (refd)

Eon Finance Bhd v Lee Shin Koon [1997] MLJU 34; [1997] 7 MLRH 743, HC (refd)
Kong Ming Bank Berhad v Sim Siok Eng [1982] 2 MLJ 205, HC (refd)
Kong Ming Finance Corporation v Lee Shin Khoon [1994] 1 CLJ 261, HC (distd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Malayan Banking Bhd v Aktimas Sdn Bhd & Ors [2008] 1 MLJ 707, HC (refd)
Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504, HC (refd)

Legislation referred to

Limitation Act 1963 [IND] art 62
Rules of the High Court 1980 O 18 r 19, O 92 r 4
Sabah Limitation Ordinance (Cap 72) Item 101
Sarawak Limitation Ordinance (Cap 49) s 3, Items 94, 101, Part II

Appeal from: Civil Suit No KCH-22NCC-5/2 of 2014 (High Court, Kuching)

Lim Heng Choo (Lim & Lim Advocates) for the appellant.
Allan Lao (David Allan Sagah & Teng) for the respondent.

Abdul Rahman Sebli JCA:

[1] This appeal raises the question whether it is Item 94 or Item 101 of the Schedule to the Sarawak Limitation Ordinance ('the Ordinance') that applies to an action brought against a guarantor for the breach by the borrower of a loan agreement secured by a third party charge. For convenience we shall refer to the parties as they were in the High Court, viz the respondent as plaintiff and the appellant as the defendant.

[2] We must state at the outset that this case is not about the merits of the plaintiff's claim but whether the claim was filed within the time prescribed by law. Both Item 94 and Item 101 fall under s 3 Part II of the Ordinance under the heading 'LIMITATION OF SUITS'. Section 3 provides as follows:

> 3 Subject to sections 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefor by the Schedule, if the limitation has been set up as a defence, shall be dismissed.

[3] The use of the word 'shall' in the provision connotes its mandatory nature, which means the court has no discretion but to dismiss the action if limitation has set in. The rule is that once limitation is raised as a defence by the defendant, the burden of proving that the action was brought within the limitation period lies with the plaintiff: *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504.

[4] For ease of reference we reproduce below the operative parts of Item 94 and Item 101 of the Schedule:

94. For compensation for the breach of a contract in writing ...	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.
101. To enforce payment of money charged upon immovable property ...	Twelve years	When the money sued for becomes due.

[5] The distinction between the two Items is that while Item 94 is for an action for breach of a contract in writing, Item 101 is for an action to enforce payment of money charged upon immovable property. In the court below the defendant applied to strike out the plaintiff's claim under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 on the ground that the plaintiff's action was time barred, having been filed outside the six year limitation period prescribed by Item 94 of the Schedule.

[6] In dismissing the defendant's application, the learned judge acceded to the plaintiff's argument that the suit was to enforce payment of money charged upon immovable property and rejected the defendant's contention that the action was premised on a breach of contract.

[7] The facts in so far as they are relevant for purposes of this appeal are as follows. On 11 July 2003, Bumiputra-Commerce Bank Bhd, now known as CIMB Bank Bhd ('CIMB') executed a general facility agreement with Merces Builders (S) Sdn Bhd ('Merces Builders') for the grant of a term loan for the sum of RM5m. The corporate guarantor was Merces Builders while the personal guarantors were the defendant and two other persons. By cl 8 of the letter of guarantee and indemnity, also executed on 11 July 2003, the defendant covenanted as follows:

(a) to pay the plaintiff on demand all monies and liabilities owing by the borrower under the facility, together with all principal sums and interests and all costs, charges and expenses including legal costs on a solicitor and client basis or on full indemnity basis incurred in enforcing or seeking to obtain payment of all or any part of the money thereby guaranteed and due and punctual performance and discharge by the borrower; and

(b) to indemnify the plaintiff against all the obligations and liabilities of the borrower upon demand against all losses, costs and expenses suffered or

incurred by the plaintiff arising from or in connection with the failure of the borrower to fulfill their obligations under the loan agreement and other security documents.

[8] It is obvious that it was a demand guarantee. For a guarantee of this nature, it was held by Hamid Sultan JC (as he then was) in *Malayan Banking Bhd v Aktimas Sdn Bhd & Ors* [2008] 1 MLJ 707 that the guarantor's liability commences from the date of demand and the guarantor is deemed to have breached the contract of guarantee if he refuses to comply with the demand. The plaintiff sued the defendant in its capacity as successor-in-title to CIMB.

[9] An important factual feature of the case is that the RM5m loan was secured by a third party charge over a piece of land described as Lot 9291 Block 11 Muara Tebas Land District. This land belonged to the Land Custody Development Authority ('LCDA') and had been charged to the plaintiff by LCDA vide memorandum of charge instrument No L12208/2000. Merces Builders being holder of an irrevocable power of attorney over the land granted by LCDA was also a signatory to the memorandum of charge, but not the defendant.

[10] The purpose of the facility was to part finance the completion of the infrastructure in Phase II as well as the construction of flats for LCDA of the Tabuan Park housing project in Kuching, Sarawak. Mercers Builders defaulted on the loan.

[11] On 19 June 2007, CIMB's solicitors wrote to Merces Builders to recall the facility with immediate effect and demanded payment of the outstanding sum of RM7,857,698.30 inclusive of accrued interest. In the said letter, the solicitors referred to their earlier demand letter dated 9 June 2007 where the bank threatened to institute legal proceedings against Merces Builders and the corporate guarantors as well as the personal guarantors including the defendant if the demanded sum of RM7,857,698.30 was not paid up.

[12] However, it was not until 26 February 2014 that the plaintiff decided to file the present action against the defendant. This was more than six years after the letter of demand was issued on 9 June 2007.

[13] The question as to whether the plaintiff's action was filed within or outside the limitation period depends on whether it was a claim for breach of a contract in writing or whether it was to enforce payment of money charged upon immovable property. If it is the former, Item 94 of the Schedule applies in which case the last date for the plaintiff to file the action fell on 9 June 2013, which had already passed. But if it is the latter, then Item 101 applies, in which

case the plaintiff was well within time to file the action as it had until 9 June 2019 to sue the defendant.

[14] Three things need to be noted with regard to the plaintiff's claim. First, it was premised on a breach of contract by Merces Builders for which the defendant was equally and personally liable under the letter of guarantee and indemnity. Second, the letter of guarantee and indemnity was a contract in writing. Third, the plaintiff as chargee had not taken any action to enforce the third party charge to recover the outstanding loan amount.

[15] Given that the letter of guarantee and indemnity was a contract in writing, prima facie any action for breach of the contract would fall under Item 94 of the Schedule. This is crux to the issue and must always be kept in mind when considering whether it is Item 94 or Item 101 of the Schedule that applies to the factual matrix of the case.

[16] In *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205, a case that originated from the High Court at Kuching Sarawak, the judicial committee of the Privy Council comprising Lord Diplock, Lord Elwyn-Jones, Lord Scarman, Lord Bridge of Harwich and Lord Brightman made the following pertinent observations with regard to the matter at p 209:

> But is the claim properly described as one for compensation for breach of contract? The Indian origin of the Ordinance now assumes importance. In *Vythilinga Pillai v Thetchanamurti Pillai* (1880) ILR 3 Mad 76 the High Court of Madras held that a suit to recover arrears of rent was a claim for breach of contract. *The court noted that compensation was a general term used in the Indian Contract Act to denote a payment which a party is entitled to claim on account of loss or damage arising from breach of contract.* In *Tricomdas Cooverji Bhoja v Gopinath Jiu Thakur* [1916] 44 IA 65 the judicial committee of the Privy Council took the same view. Lord Summer, who delivered the judgment of the board commented (at p 70) that an interpretation so often and so long put upon the statute by the courts in India should not now be disturbed.
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> Their Lordships respectfully agree. The claim in this suit may properly be described as one for compensation for breach of contract. The contract being in writing, the period of limitation is six years. (Emphasis added.)

[17] The plaintiff's cause of action, based as it was on the letter of guarantee and indemnity, was to enforce the defendant's promise to pay on demand the guaranteed sum of RM5m inclusive of interest and we say this on the assumption that Mercers Builders had in fact breached its loan agreement with the plaintiff. In effect what the plaintiff was telling the defendant was 'I have suffered loss as a result of Merces Builder's breach of contract. Now I demand from you as guarantor to compensate me for the loss as promised by you in your Letter of Guarantee and Indemnity'.

[18] That was exactly what the plaintiff proceeded to do when it issued the letter of demand and instituting the present action against the defendant. It was clearly an action to enforce the letter of guarantee and indemnity. It was not an action to enforce the memorandum of charge.

[19] On the surface, the plaintiff's action looks like an action to enforce payment of money charged upon immovable property as the RM5m loan was pegged to the third party charge, but it was not. It was a straightforward action against the defendant personally to enforce payment of money as promised in the letter of guarantee and indemnity.

[20] In our view, an action to enforce payment of money charged upon immovable property under Item 101 of the Schedule can only be done by enforcing the charge. It cannot be done by enforcing the letter of guarantee and indemnity simply because the letter of guarantee and indemnity is not a charge document. It is a guarantee document to pay on demand any sum due under the loan agreement between the chargor and the chargee of which the defendant was equally and personally liable.

[21] The fact that cl 10 of the letter of guarantee and indemnity expressly provides that the defendant was not only a guarantor but also a principal debtor does not turn the plaintiff's action into an action to enforce payment of money upon charged property. It remains an action premised on breach of a contract in writing, the breach being the defendant's failure to pay the guaranteed sum on demand upon breach by the borrower of its contract with the plaintiff.

[22] It is important to note that it was not the plaintiff's pleaded case that the defendant's liability to pay up the RM5m debt was on account of money charged upon immovable property, ie the third party charge. As we have alluded to earlier, the property was charged to the plaintiff by LCDA and Merces Builders and not by the defendant. It is inconceivable how in that situation the plaintiff's action which was based on the letter of guarantee and indemnity and not on the memorandum of charge can be described as an action to enforce payment of money charged upon that property.

[23] In UN Mitra's *Law of Limitation & Prescription*, (12th Ed, 2006 Vol 2), the following passage can be found at p 1289:

> 7. 'Charged upon immovable property' – Even before the present article the Privy Council made it clear that the word 'charged' in Article 132 of the 1908 Act included money secured by a mortgage. A 'charge' implies that certain property is earmarked for the payment of a certain debt. It is an obligation to hold a specified property responsible for the payment of a debt, *the debt being realized by the sale of such property*, but there is no transfer of any interest in immovable property. (Emphasis added)

[24] Learned counsel for the plaintiff relied on the then Supreme Court decision in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court said at p 93:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in the loan agreement that was entered between the parties. He may proceed against any surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842.
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> Thus, in the absence of any special circumstances, a chargee who has obtained an order for sale is not barred by res judicata or any form of estoppel from pursuing actions in personam against the chargor or the surety.

[25] With due respect to learned counsel, his reliance on the decision is misconceived as it was clearly not a case on limitation. The principal issue for the court's determination in that case was whether the order for sale of the charged land was wrongly granted by the High Court. Further, the plaintiff bank in that case actually took out an action to enforce the statutory charge by way of an order for sale of the charged property, unlike the case before us. The ratio decidendi of the case is therefore inapplicable in determining the issue before us.

[26] Even if the plaintiff in the present case had taken charge action against the chargor for sale of the charged property and that its action against the defendant was an action that was taken 'simultaneously, contemporaneously or successively' with the charge action, it does not detract from the fact that the action against the defendant was an action for breach of a contract in writing and not an action to enforce payment of money charged upon immovable property. This takes the action outside the scope of Item 101 of the Schedule.

[27] For the avoidance of doubt, we are not here suggesting that the defendant was not personally liable to pay the guaranteed sum on demand. Of course he was liable to pay but his liability to pay was on account of his undertaking under the letter of guarantee and indemnity and not on account of money charged upon the charged property. It is important to bear this distinction in mind as it determines which Item of the Schedule would the plaintiff's action fall under.

[28] Given the nature of the defendant's undertaking, the plaintiff must first prove breach by Merces Builders of its contract with the plaintiff before the defendant could be made liable under the letter of guarantee and indemnity.

This is simple logic and common sense because a guarantor cannot be in breach of his undertaking if the borrower is not in breach of his contract.

[29] In *Eon Finance Bhd v Lee Shin Koon* [1997] MLJU 34; [1997] 7 MLRH 743 Tee Ah Seng J (as he then was) of the Sibu High Court held that Item 101 of the Ordinance does not apply to recover money personally from the defendant, relying on the decision of the Federal Court in *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95 where Ong CJ delivering the judgment of the court said:

> The chargee's claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the monies realised fall short of the amount needed to satisfy his claim for principal and interest.

[30] The above passage illustrates the point, although not directly, that an action for payment of money charged upon immovable property must start with an action against the chargor in default. It is only when the money realised from the sale of the charged property is insufficient to satisfy the chargee's claim that it would be proper, or shall we say conscionable, to call upon the guarantor, being equally and personally liable under the letter of guarantee and indemnity, to honour his covenant to pay. After all that was what the charged property was earmarked for.

[31] Indeed this is what cl 11.4 of the memorandum of charge is all about, which stipulates as follows:

> Without prejudice to any other remedies available to the Bank, if the amount realized by the Bank on the sale of the said land, whether pursuant to the provisions of this Charge or under the provisions of the National Land Code or otherwise, after deduction and payment from the proceeds of such sale of all expenses dues costs rents rates taxes and other outgoing on the said land and all expenses incurred in connection with the making and carrying into effect the sale whether at such sale the Bank is the purchaser of the said land or otherwise, is less than the amount due to the Bank hereunder the Chargor shall pay to the Bank the difference between the amount due and the amount so realized and until payment the Chargor will also pay interest on such balance at the Default Rate (as well after as before any Court Order or Judgment and as well after as before the sale of the Said Land).

[32] The learned judge in *Eon Finance Bhd* also relied on the following passage in *BB Mitra on the Limitation Act 1963*, (18th Ed) where the learned authors in dealing with art 62 of the Indian Limitation Act 1963 which is in pari materia with Item 101 of the Ordinance wrote at p 520 para 529:

> This Article applies to suits to recover money charged on immovable property, by sale of that property, it is inapplicable to a suit to recover money personally from the

defendant, even though the money may be charged on the property ...

Article 62 applies to a case where the plaintiff seeks to enforce payment of money by enforcing his charge upon an immovable property. *The article has no application to a case where the plaintiff asks for a money decree only*. (Emphasis added.)

[33] On the facts of the present case, there can be no doubt that the plaintiff's action was to ask for a monetary decree only from the defendant and not to enforce payment of money by enforcing the third party charge. It needs to be emphasised that the plaintiff's claim for the RM7,857,698.30 debt inclusive of accrued interest was an action in personam against the defendant and not an action in rem to enforce payment of money charged upon immovable property. Such action falls squarely within the confines of Item 94 of the Schedule and not Item 101. The limitation period is therefore six years from the date of demand.

[34] There are three other decisions emanating from the High Court of Sabah and Sarawak that deal with the subject. The first is *Borneo Housing Mortgage Finance Bhd v Mygal bin Gibie & Anor* [2004] 4 MLJ 12 where Linton Albert JC (as he then was) in dealing with Item 101 of the Sabah Limitation Ordinance which is similar to its Sarawak counterpart said at para [8]:

I do not hesitate also to reject the appellant's contention that Item 101 of the Sabah Limitation Ordinance (Cap 72) which prescribes 12 years as the limitation period is applicable. The loan agreement is clearly not a charge and, therefore, Item 101 does not apply. The fact that the loan agreement empowers the appellant to sell and assign the property and apply the proceeds of sale towards the settlement of the loan do not convert the loan into money charged upon immovable security within the meaning of Item 101.

[35] The second case is *Datuk Bandar Kuching Utara v Kuching Plaza Sdn Bhd & Ors* [2007] 3 MLJ 346 where David Wong Dak Wah JC (as he then was) held that Item 101 of the Schedule to the Ordinance is only applicable to an action by the chargee to enforce his rights under a memorandum of charge to sell or foreclose the charged property.

[36] Learned counsel for the plaintiff contended that the decision is incorrect as the learned judge failed to take into account Item 114 of the Schedule which sets sixty years as the limitation period for an action by a mortgagee or chargee for foreclosure or sale. According to counsel the implication of the decision is that it will render Item 114 contradictory to Item 101. Our short answer to the argument is that the proposition is neither here nor there as it cuts both ways.

[37] The learned judge preferred the decision of Steve Shim J (as he then was) in the third case of *Kong Ming Finance Corporation v Lee Shin Koon* [1994] 1 CLJ 261 over the decision of David Wong Dak Wah JC in *Datuk Bandar Kuching Utara*. The salient facts in *Kong Ming Finance Corporation* are these. The defendant had charged two pieces of his land as security for a loan given to a third party. The third party defaulted on repayment of the loan whereupon the plaintiff applied for an order for sale of the charged lands by public action but the auctions were unsuccessful.

[38] The lands were then sold by private treaty but the proceeds from the sale were insufficient to pay the outstanding amount. The plaintiff then filed an action against the defendant chargor to recover the outstanding balance. Steve Shim J, citing *Halsbury's Laws of England*, (4th Ed) Vol 28 at p 297 described the contract between the plaintiff and the defendant as 'a kind of specialty contract' as the sum of RM306,519 that the plaintiff claimed was inextricably linked to the loan advanced by the plaintiff upon the terms and conditions in the memorandum of charge executed between the parties.

[39] It can immediately be seen that the plaintiff's claim in that case was based on the terms and conditions in the memorandum of charge and as such was rightly described as an action to enforce payment of money charged upon immovable property, and the plaintiff's action was against the chargor himself. That is not the case in the appeal before us. The plaintiff's action was against the guarantor and was based not on the terms and conditions in the memorandum of charge but on the terms in the letter of guarantee and indemnity.

[40] To recapitulate, the defendant's covenants in the letter of guarantee and indemnity were:

(a) to pay the plaintiff on demand all monies and liabilities owing by the borrower under the facility, together with all principal sums and interests and all costs, charges and expenses including legal coats on a solicitor and client basis or on full indemnity basis incurred in enforcing or seeking to obtain payment of all or any part of the money thereby guaranteed and due and punctual performance and discharge by the borrower; and

(b) to indemnify the plaintiff against all the obligations and liabilities of the borrower upon demand against all losses, costs and expenses suffered or incurred by the plaintiff arising from or in connection with the failure of the borrower to fulfill their obligations under the loan agreement and other security documents.

[41] The decision in *Kong Ming Finance Corporation* is therefore distinguishable as the facts are materially at odds with the facts of the present

case, the most significant of which is that the plaintiff's action in that case was to recover the balance of the loan sum after a charge action had been taken against the chargor, whereas in the case before us the plaintiff had not taken any charge action against the charged property (which did not belong to the defendant anyway) but instead went straight after the guarantor to recover the debt based on the letter of guarantee and indemnity. With all due respect to the learned judge, her reliance on *Kong Ming Finance Corporation* is not quite correct in the circumstances.

[42] For reasons aforesaid, we were unanimous in our view that the learned judge was wrong in dismissing the defendant's application to strike out the plaintiff's claim. This is a plain case which ought not to go for trial. The claim was clearly time barred and ought to have been struck out. Accordingly we allowed the defendant's appeal with costs.

Appeal allowed with costs.

Reported by Kohila Nesan